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No. 97-459

IN THE

# SUPREME COURT OF THE UNITED STATES

October Term, 1996

WOLFGANG WILLIAM BRAB, - - - *Petitioner,*

*versus*

JANE D. HILL, - - - - - - - *Respondent.*

On Petition for Writ of Certiorari
To the Commonwealth of Kentucky
Court of Appeals

## RESPONDENT'S BRIEF IN OPPOSITION

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October 14, 1997

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## RESPONDENT'S BRIEF IN OPPOSITION

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## STATEMENT OF THE CASE

This is a cross petition arising out of the same facts as No. 97-450, *sub. nom Hill* v. *Hilliard, et al.* docketed on September 12, 1997. The cross petitions and the Kentucky Court of Appeals opinion adequately set forth the background necessary for this Court's consideration of the questions presented.

There is no material factual dispute. Both petitions arise essentially out of Hill's claims that Brab raped her while both were attending a securities industry meeting in New York and, when Hill subsequently reported the incident, Brab and his colleagues on the Board of Directors retaliated against her.

## REASONS FOR DENYING THE PETITION IN THIS CASE

### 1. A Case Arising Out Of A Rape Should Not Be Decided By Securities Industry Arbitrators

It is important to emphasize what Brab's petition is really saying in this case. It amounts to an assertion that he can avoid being sued in court for raping a subordinate because a mandatory arbitration clause in an application requires that disputes "arising out of employment" be decided by his fellow securities industry executives.[1] It is hard to imagine a dispute more unsuited to resolution under the process approved of in *Gilmer*.[2] Presumably, if Brab had murdered Hill in addition to raping her, he would argue that the wrongful death suit should likewise be decided by securities industry arbitrators.

The proposition that *Gilmer* requires arbitration of Hill's rape claims against Brab is ridiculous on its face.

### 2. There Is No Conflict In The Lower Courts

Brab's petition is unable to cite a single case in which arbitration of a rape claim was deferred to arbitration. The two cases cited, *Bender* v. *Edwards Sons, Inc.*, 971 F.2d 698 (11th Cir. 1992) and *Bachus & Stratton, Inc.* v. *Mann*, 639 So. 2d 35 (Fla. App. 4 Dist. 1944), are *per curiam* opinions and merely note pendent tort claims of assault and battery. For all that appears in these opinions, the tort claims are incidental to a garden variety employment dispute. There is no discussion in either case suggesting it arose out of the defendant's raping his subordinate. These bare claims of assault and battery are hardly

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[1]Securities industry arbitrators are almost all white males, involved with the securities industry, over age 60, with no legal experience required. *See* Hill's petition at p. 13 n. 22.

[2]*Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20. (1991).

comparable to the rape allegation made by Hill in this case.

The analytical flaw in Brab's petition is its erroneous assumption that all claims with the label "tort" should be classified as arbitrable under *Gilmer*. However, it is not the legal label assigned to the claim but the substance of the underlying allegations that determine whether the claims are arbitrable under the FAA. *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 622 n. 9, (1985)

The Court of Appeals was clearly correct in its view that Hill's rape claim against Brab was "independent of the employment relationship" and therefore not subject to arbitration. Where the Court of Appeals went wrong was its refusal to find that the subsequent retaliation claims against Brab and his colleagues also arose out of the alleged rape. (*See* Hill's petition, at pp. 14-18)

### 3. The Court Of Appeals Decision Requires Piecemeal Resolution Of The Dispute

There is one point in Brab's argument on which there is agreement. It is true that the Court of Appeals' opinion requires piecemeal resolution with its attendant burdens on the parties. As noted by the Court of Appeals, however, an arbitration agreement will not be expanded merely for the sake of efficiency and piecemeal resolution will be the result if required by the contract. *Moses H. Cone Memorial Hospital* v. *Mercury Construction Corp.*, 460 U.S. 1, 24 (1983)

It is appropriate to point out, in contrast, that the drawbacks of piecemeal resolution are avoided under voluntary arbitration as suggested in Hill's petition. (*See* pp. 5-12) By voluntarily selecting arbitration after the dispute has arisen, the parties have the opportunity to shape the process to resolve all the issues involved.

## CONCLUSION

This Court should review the Kentucky Court of Appeals decision for the reasons stated in Hill's petition, not because there was any error in its holding that Hill's being raped was outside the scope of her employment.

Respectfully submitted,

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